UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Terrorist Attacks on September 11, 2001	03 MDL 1570 (GBD) (SN) ECF Case

This document relates to:

Kathleen Ashton, et al. v. Al Qaeda Islamic Army, et al., Case No. 02 Civ. 6977
Thomas Burnett, Sr., et al. v. Al Baraka Inv. & Dev. Corp., et al., No. 03 Civ. 9849
Federal Insurance Co., et al. v. Al Qaida, et al., No. 03 Civ. 6978
Continental Casualty Co., et al. v. Al Qaeda, et al., No. 04 Civ. 5970
Euro Brokers Inc., et al., v. Al Baraka, et al., No. 04 Civ. 7279
Estate of John P. O'Neill et. al., v. Al Baraka et. al., No. 04 Civ. 1923
World Trade Center Properties, L.L.C. et al. v. Al Baraka Investment and Development Corp., et al., No. 04 Civ. 7280[1]

DECLARATION OF PETER C. SALERNO IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL AGAINST YASSIN ABDULLAH KADI

Peter C. Salerno declares that the following statement is true:

1. I am a principal in the law firm of Salerno & Rothstein, counsel to defendant Yassin Abdullah Kadi ("Mr. Kadi") in this multi-district litigation and the individual cases listed above. I am a member in good standing of the Bar of the State of New York and of this Court. I make this declaration to correct material misstatements and omissions in Plaintiffs' motion to compel dated December 1, 2017, and to supply information and documents necessary

---

[1] In their motion, Plaintiffs do not include the *World Trade Center Properties* case as one to which the motion relates. Mr. Kadi is a party to that case. Conversely, Plaintiffs identify the *Cantor Fitzgerald & Co.* case (actually titled *Cantor Fitzgerald Associates, L.P.*) as one to which the motion relates, but Mr. Kadi is not identified on this Court's docket sheet (04-cv-07065) as a defendant in that case.

to the Court's fair consideration of that motion. This declaration, the accompanying declarations of Guy Martin and Mr. Kadi, the accompanying memorandum of law, and the exhibits filed therewith will demonstrate that Mr. Kadi has made a more than good faith effort to meet his discovery obligations in this case; that Plaintiffs' motion is not substantially justified; and that attorneys' fees should be awarded to Mr. Kadi pursuant to Fed. R. Civ. P. 37(a)(5).

Plaintiffs' Requests, Mr. Kadi's Responses, and the Parties' Communications Relating Thereto

2. The first two pages of Plaintiffs' Memorandum of Law ("MOL") in support of their motion do not completely describe the dealings between the parties with respect to Mr. Kadi's document production. As a result the memorandum is materially misleading. This section of this declaration will clarify the record.

3. The first sentence of Plaintiffs' MOL incorrectly describes the chronology of the discovery requests leading up to this motion. Mr. Kadi did not respond, on September 30, 2013 or any other time, to discovery requests allegedly served on August 1, 2008[2] because his motion to dismiss was *sub judice* at that time.[3] That motion was granted on September 13, 2010 (740 F. Supp.2d 494).[4] After the Second Circuit's remand on April 16, 2013 of the claims against Mr. Kadi for jurisdictional discovery, 714 F.3d 659, Plaintiffs served their "First Set of

---

[2] We have been unable to find any record of such a document request. Plaintiffs' assertion in their Memorandum of Law that it exists is supported by neither a declaration nor a copy of the request.

[3] The motion was filed on February 3, 2006 (ECF Nos. 1658, 1659, and 1660).

[4] Final judgment pursuant to Fed. R. Civ. P. 54(b) was entered July 14, 2011. (ECF No. 2446).

Jurisdictional Requests for Production of Documents" directed to Mr. Kadi on August 22, 2013. (A copy of this document request is filed herewith as Exhibit A.)

4. As can be seen, this document request contains 111 separately numbered paragraphs. Three pairs of those requests (numbers 97 through 102) refer to three attachments which contain a total of 116 names of individuals and organizations, in effect multiplying the number of requests to 337.

5. Mr. Kadi served an initial formal response to this document request on November 11, 2013, together with an initial production. (A copy of that response is filed herewith as Exhibit B.) That response included a number of objections that particular requests were beyond the scope of the Second Circuit's remand, were overbroad, and were not reasonably calculated to lead to the discovery of admissible evidence regarding personal jurisdiction. Then and thereafter, through December 2014, Mr. Kadi made five document productions, totaling 104,302 pages.

6. As Plaintiffs correctly state, Mr. Kadi made a production on December 15, 2014 (a deadline that had been set by Magistrate Judge Maas), and in a letter of that date I identified that production as our "fifth and final" one. (Plaintiffs' Ex. 1).

7. Plaintiffs omit to mention, however, that in their Exhibit 1 I also stated, "In a few days we will send you our privilege log as well as well as a list of your requests as to which we have withheld documents on the basis of our non-privilege based objections to those requests, as required by Judge Maas's direction at the December 20, 2013 conference (Transcript at 31)." Thus, contrary to Plaintiffs' assertion at p. 2 of their MOL, Mr. Kadi did *not*, through his

counsel, state that "he had given us everything he had, minus privileged material." We explicitly stated that documents were being withheld pursuant to non-privilege-based objections.

8. On December 19, 2014 I sent Plaintiffs' counsel a letter listing the requests as to which we had withheld documents pursuant to non-privilege-based objections. (A copy of this letter is filed herewith as Exhibit C.)

9. Plaintiffs also mislead the court by stating that Mr. Kadi's post-2014 production occurred "with prodding." The only "prodding" was Plaintiffs' "deficiency" letter to us dated May 6, 2015 (Plaintiffs' MOL Ex. 2), as well as a second set of document requests of that date that effectively contained 59 items, though some were duplicative of the first set of requests (copy filed herewith as Exhibit D).[5] In response to Plaintiffs' May 6, 2015 letter and second set of document requests, in an effort to minimize discovery disputes and in the hope of avoiding discovery litigation altogether, Mr. Kadi and his counsel determined to make a more fulsome production that would not invoke *any* objection, other than privilege (and two other minor bases that Plaintiffs do not challenge), to both Plaintiffs' first and second sets of document requests.[6] (*See* my email to Plaintiffs' counsel dated June 10, 2015 (copy filed herewith as Exhibit E)).

---

[5] In combination with the effective 337 requests in Plaintiffs' first set of document requests, the total number of document requests propounded by Plaintiffs and to which Mr. Kadi has responded is 396.

[6] We did this even though the second set of requests was untimely as being more than 20 months after the August 2013 deadline set by Judge Maas. (*See* letter endorsed August 15, 2013, ECF No. 2770).

10. By letter dated August 7, 2015, we responded in detail to Plaintiffs' May 6, 2015 letter. (Copy filed herewith as Exhibit F).

11. Between mid-2015 and March 2017, Kadi's defense team reviewed documents previously objected to, as well as made another extensive search of the client's files for additional responsive documents. (*See* Declaration of Guy Frederick Noel Martin ("Martin Dec.") ¶ 8).

12. By early April 2017 we had completed Mr. Kadi's document production. By email dated April 18, 2017, I informed Plaintiffs' counsel that "We are not withholding any documents pursuant to any objection to either your first or second requests on any ground other than privilege or work product protection. We have attempted to produce every document in our client's possession, custody or control that is responsive to your requests." (A copy of this email is filed herewith as Exhibit G).

13. By letter dated April 27, 2017 we informed Plaintiffs' counsel in more detail of our position regarding the completeness of our production, and made clear that

> "We believe we have produced every document in our client's possession, custody, or control that is responsive to your first and second sets of document requests, including the bank account lists attached to your first and second sets, subject to the comments in the previous paragraph [privilege, two other bases for withholding a small quantity of documents, and the temporal limitations set by the Court]."

April 27, 2017 Letter at 2 (copy filed herewith as Exhibit H).[7]

---

[7] Temporal discovery boundaries of 1992 through 2004 were established for this case. *See* Judge Daniels's order dated December 21, 2007 (ECF No. 2059) (setting start date of 1992 with respect to defendants MWL, IIRO, and Jelaidan; Mr. Kadi's motion to dismiss was pending at the time of that order); Transcript of conference before Magistrate Judge Maas March 22, 2016 (ECF No. 3253) at 14 (statement of Sean Carter, one of Plaintiffs' counsel: "... the period that's been determined by the Court to be the outside limit of discovery which is 2004.").

14. Also on April 27, 2017 we served on Plaintiffs' counsel a formal supplemental response to their first document request, and a formal response to their second document request. (Copies of these documents are filed herewith as Exhibits I and J, respectively). In both these responses Kadi's counsel certified that we had produced every responsive document in our client's possession, custody, or control, notwithstanding any objections to any request (but subject to the qualifications set forth in the indented quote above).

15. On July 20, 2017, Andrew Maloney, one of Plaintiffs' counsel, sent us a letter purporting to identify gaps in Mr. Kadi's production. This letter in many cases repeated complaints in his May 6, 2015 letter. We responded on July 26, 2017. (Copies of these July 2017 letters are filed herewith as Exhibits K and L, respectively.) In that response I reiterated that we had not knowingly withheld any non-privileged responsive document; I explained that the age of the documents explained their unavailability; and I provided specific responses, with citations to documents, to some of Plaintiffs' specific complaints.

The "Meet-and-Confer" Process

16. Plaintiffs attempted no meaningful meet-and-confer with respect to the challenges to Mr. Kadi's privilege claims. Prior to making this motion, they never identified as questionable any of the documents they now challenge. (MOL at 16-17).

17. The chronology of communications on the topic is this: In their May 6, 2015 letter they complained generally about redactions, asked for a log, and cited three documents as to which they wanted the rationale for the redactions. (Plaintiffs' Ex. 2 at 12). We

answered their questions in our August 7, 2015 letter (Ex. F at 7), and those documents are not discussed in their motion to compel.

18. Plaintiffs' only "deficiency" letter after document production was completed was their July 20, 2017 letter. (Ex. K). That letter makes *no* mention of privilege. Plaintiffs' discovery status letter to the Court dated August 31, 2017 (ECF No. 3713) said the following: "Plaintiffs takes [*sic*] issue with the over broad privilege log objections Kadi has served.... Plaintiffs anticipate a motion to compel will be necessary to address ... several documents listed on the privilege log." (Copy filed herewith as Exhibit M, at 9, 10). These are the only mentions in that letter of complaints about Mr. Kadi's assertions of privilege. The day after that letter, I wrote Plaintiffs' counsel asking, "What are your issues regarding our privilege log? (Letter, p. 9, 10). Your August 31 status report is the first we have heard that you have any concerns regarding it." (*See* copy of this letter, filed herewith as Exhibit N, at 1).

19. In an email on September 6, 2017, in response to my September 1 letter, Mr. Maloney articulated Plaintiffs' concerns about privilege solely with a short general discourse on the nature of the work product protection. No specific documents were identified, and no reference was made to attorney-client privilege or waiver issues due to disclosure to third parties. (Copy of this email filed herewith as Exhibit O).[8] By contrast, in their motion Plaintiffs make no

---

[8] Mr. Maloney also stated in this email Plaintiffs' belief that work-product created for unrelated litigation would not be protected in the instant litigation. That is not the law. (*See* Mr. Kadi's Memorandum of Law at 14 n.17).

reference whatever to work product documents, but only to attorney-client privilege and alleged waiver. (MOL at 14-16).

20. I responded by letter to Mr. Maloney's September 6 email the same day, pointing out that his discourse on work-product protection was applicable only to documents not also identified as attorney-client privileged, as only in such a case would their argument, if correct, lead to disclosure of the document. I pointed out that there were five such documents. (*See* copy of this letter, filed herewith as Exhibit P, at 2).[9]

21. Plaintiffs' and Mr. Kadi's counsel chatted briefly in court during our attendance at the conference before this Court on September 7, 2017. On the record at that conference, Mr. Maloney (misspelled "Mahoney" in the transcript) stated, "[T]here was an extensive privilege log that was given to us that I want to discuss with Mr. Salerno in the next week or two to see whether or not we will make a motion regarding some of the documents he has identified there." (Tr. at 15). (A copy of relevant pages of this transcript is filed herewith as Exhibit R).

22. On September 20, in an email in which Mr. Maloney sought our consent to an extension of Plaintiffs' time to file a motion to compel from the then-established October 13 deadline to December 1 (both our consent and the extension were granted), Mr. Maloney stated that Plaintiffs had "lots of work to do to review the Kadi production regarding gaps and

---

[9] On September 16 I sent an email to Mr. Maloney stating that the correct number of documents as to which only work-product protection was invoked was seven. (Copy filed herewith as Exhibit Q). There are now five additional documents in this category: Items 11 and 14-17 in our privilege log, which were questioned by Plaintiffs. (MOL at 15; *see* Martin Dec. ¶ 26; Kadi MOL at 14-15).

the privilege log.... [W]e would prefer to finish a thorough review and confer with you on all issues by Nov." (Copy filed herewith as Exhibit S). In a further email on September 29, 2017 email Mr. Maloney wrote, "We will plan to meet and confer some more with you before Dec. 1, hopefully in early to mid-November." (Copy filed herewith as Exhibit T). Similarly, in a letter to the Court filed on September 29, 2017 requesting the extension of time to file this motion, Mr. Maloney stated, "We have had several meet and confer exchanges and anticipate more to follow in November." (ECF No. 3730; copy filed herewith as Exhibit U).

23. Despite Mr. Maloney's statements on September 7 in court and September 20 and 29 in writing, Plaintiffs never contacted us further about privilege concerns (or any other discovery concerns) until the filing of the instant motion on December 1.

24. Thus, we were never given an opportunity to address the privilege concerns Plaintiffs particularized for the first time in their motion. Given that the three privilege issues Plaintiffs raised in their May 6, 2015 letter (to which we responded in August 2015) were not raised in their motion to compel, it is certainly possible that that the explanations we now offer would have obviated at least some of the privilege issues they now raise.

25. To summarize: Mr. Kadi and his defense team have made every reasonable effort to produce every document that is responsive to any of Plaintiffs' 396 document requests, other than documents protected by privilege and two other uncontested categories of documents described in Plaintiffs' Exhibit 1. As the Martin and Kadi Declarations make clear, Mr. Kadi's London counsel, Guy Martin, was given unfettered access to the client's files for the

purpose of responding to Plaintiffs' requests. (Martin Dec. ¶ 9; Declaration of Yassin Abdullah Kadi dated January 10, 2018 at ¶ 4).

Factual Background

26. Plaintiffs make much of the fact that within a month of September 11, 2001 Mr. Kadi was listed by the U.S. Office of Foreign Assets Control as a "Specially Designated Global Terrorist" ("SDGT") (See Plaintiffs' MOL at 2). For completeness, they ought to have informed the Court that Mr. Kadi was de-listed as an SDGT on November 26, 2014. 79 Fed. Reg. 72248 (a copy of this page of the *Federal Register* is annexed hereto as Exhibit V). If the listing is thought to have any significance, the de-listing should bear equal significance.

27. Similarly, Plaintiffs refer to other governmental activities directed at Mr. Kadi, such as the Swiss investigation by Claude Nicati, the "suspicions" of the U.K. Treasury Department, the United Nations listing etc. (See Plaintiffs' MOL at 3). Once again, completeness would dictate making the Court aware of the following:

a. After six years of investigation, the Swiss government filed no charges whatsoever against Mr. Kadi;

b. All jurisdictions that had "listed" Mr. Kadi, including the U.K., the E.U., and the U.N. (as well as the United States) have de-listed him.

(*See* Martin Dec. ¶ 3 and Exs. W, X, and Y).

28. Wherefore, I respectfully request that Plaintiffs' motion to compel dated December 1, 2017 be denied, and that defendant Kadi be awarded all his expenses, including attorneys' fees, incurred in responding to this motion, pursuant to Fed. R. Civ. P. 37(a)(5)(B).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 19, 2018

Peter C. Salerno

PETER C. SALERNO